

*In the Matter of Data Processing Analyst 2 (S0402G),
Department of Health and Senior Services
DOP Docket No. 2006-4337
(Merit System Board, decided August 9, 2006)*

The appointing authority requests permission not to make an appointment from the September 1, 2005 certification for Data Processing Analyst 2 (S0402G), Department of Health and Senior Services.

The record reveals that on September 20, 2004, the appointing authority provisionally appointed Oliver Giller, pending open competitive examination to the subject title. The examination was announced with a closing date of March 15, 2005 and was administered as a written test. It resulted in an employment roster of 60 individuals. Mr. Giller was tied in the 19th ranked position on the list, which was headed by four veterans. The list promulgated on September 1, 2005 and will expire on August 31, 2008. On September 1, 2005, a certification was issued to the appointing authority. The appointing authority requested and was granted an extension of time to dispose of the certification. However, rather than disposing of the certification, the appointing authority requested an appointment waiver.

In support of its request, the appointing authority indicated that due to the stringent budgetary constraints imposed on it, it was unable to continue funding the Data Processing Analyst 2 position for salary purposes. The appointing authority also indicated that it had received exemption¹ approval from the Department of Personnel (DOP) to reassign Mr. Giller to a Health Systems Specialist 2 position. Additionally, the appointing authority stated that the certification would be disposed of by vacating the Data Processing Analyst 2 position. It is noted that the appointing authority took no action to obviate the need for this examination at the time of the announcement or prior to its administration. *See N.J.A.C. 4A:10-2.2(a)1.*

The appointing authority's request for an appointment waiver was acknowledged by the Department of Personnel (DOP), and it was advised that if its request was granted, it could be assessed for costs of the selection process in the amount of \$8,285. The appointing authority failed to submit a response as to why costs should be waived.

Finally, it is noted that DOP records indicate that the pending exemption request was denied.

CONCLUSION

¹ A hiring freeze has been in place concerning Executive Branch employees of State government. Appointing authorities are required to receive an exemption approval from the DOP prior to encumbering positions that are subject to the freeze.

In accordance with *N.J.S.A.* 11A:4-5, once the examination process has been initiated due to the appointment of a provisional employee or due to an appointing authority's request for a list to fill a vacancy, the appointing authority must make an appointment from the resulting eligible list if there are three or more interested and eligible candidates. The only exception to this mandate may be made by the Commissioner of Personnel for a valid reason such as fiscal constraints.

In the instant matter, the examination for the subject title was generated as the result of the provisional appointment of Mr. Giller to the subject title. However, after the issuance of the certification, the appointing authority indicated that it was unable to continue funding the Data Processing Analyst 2 position and reassigned Mr. Giller to a Health Systems Specialist 2 position, thereby vacating the Data Processing Analyst 2 position. While the Board recognizes that the current Executive Branch hiring freeze has reduced funding for positions not deemed exempt, the DOP ultimately denied the appointing authority's exemption request to appoint Mr. Giller to the Health Systems Specialist 2 title. Specifically, the Board notes that the Health Systems Specialist 2 title is a higher salary range (P27), than the Data Processing Analyst 2 title (salary range P26). Therefore, it is not appropriate for the appointing authority to claim fiscal constraint. Further, a review of DOP records indicates that Mr. Giller does not appear on any list for the Health Systems Specialist 2 title. Therefore, since Mr. Giller has no underlying permanent status in the career service, his provisional appointment in the Health Systems Specialist 2 title would necessitate a new open competitive examination announcement, and hence more costs. Moreover, *N.J.A.C.* 4A:4-2.3(a) provides that "vacancies shall be filled by promotional examination unless the Commissioner determines that it is in the best interest of the career service to hold an open competitive examination." Finally, under these circumstances, the Board is concerned that the actions taken by the appointing authority give an appearance of circumvention of Merit System law and rules. Accordingly, the Board finds that the appointing authority has not presented a sufficient basis for granting an appointment waiver.

In examining the legislative history of *N.J.S.A.* 11A:4-5, in *Local 198 of I.A.F.F. v. Atlantic City*, Docket No. A-855-88T1F (App. Div. 1989), the Court stated that the DOP is required to issue a certification automatically where there is a provisional appointee or a vacancy. Moreover, the Court concluded that *N.J.S.A.* 11A:4-5 unambiguously stated that once the examination process has been initiated due to the appointment of a provisional employee, the appointing authority must make an appointment from the eligible list if there is a complete certification. Additionally, the Court found that the Board was correct in interpreting *N.J.S.A.* 11A:4-5 to find that it was a clear legislative response to pervasive violations of Title 11, and that non-compliance with this statute is not a mere technical violation. Rather, it undermined the purpose and intent of the constitutionally-based merit selection system. The Court found that in circumstances such as these, it was

appropriate for the Board to order the appointing authority to make an appointment. Thus, there is no doubt that the appointing authority must make an appointment from this list if there is a complete certification, that is, one containing the names of at least three interested and eligible candidates. Moreover, the Board is specifically given the power to assess compliance costs and fines against an appointing authority, including all administrative costs and charges, as well as fines of not more than \$10,000, for noncompliance or violation of this Title or any order of the Board or Commissioner. *N.J.S.A. 11A:10-3; N.J.A.C. 4A:10-2.1(a)2. See In the Matter of Fiscal Analyst (M1351H), Newark, Docket No. A-4347-87T3.*

ORDER

Therefore, it is ordered that the request for the waiver of the appointment requirement be denied.

Further, it is ordered that the appointing authority properly dispose of the certification within 30 days of the issuance of this order, indicating the interested eligible candidates and making the appropriate appointment from the eligible list. If, at any time, the appointing authority does not adhere to the timeframes for the proper certification disposition without an approved extension of time, it shall be assessed fines of \$100 per day for each day of continued violation up to a maximum of \$10,000.

Moreover, if no proper disposition is made, the Certification Unit shall canvass the eligible list for interested eligible candidates and constructively permanently appoint the first interested eligible candidate.

This is the final administrative determination in this matter. Any further review should be pursued in a judicial forum.